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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

SPAWR OPTICAL RESEARCH, INC.
WALTER J. SPAWR, AND
FRANCES SPAWR, PETITIONERS
v.
UNITED STATES OF AMERICA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OPTICAL SOCIETY OF AMERICA, INC. AND THE SOCIETY OF PHOTO-OPTICAL INSTRUMENTATION ENGINEERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Kim A. Zeitlin
Counsel of Record
Susan E. Dorn
Lafayette Centre III
1155 Twenty-First Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 833-5775

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INTEREST OF THE *AMICI CURIAE*[1]

Optical Society of America

The Optical Society of America, Inc. ("Society"), founded in 1916, is one of the largest scientific societies in the world concerned with all aspects of the scientific and commercial applications of light.

[1]Through their counsel, the parties in this proceeding have consented to the appearance of the *Amici* and letters of consent have been filed with the Clerk pursuant to Rule 36.

The Society has 10,000 members worldwide who are primarily physicists and engineers. The membership is divided into technical areas, each of which is represented by a technical division. These divisions are photonics, quantum electronics, optical sciences, optical technology, and vision and medical optics. Every industrial nation in the world is represented among the membership; nearly 20% of the membership resides outside of the United States. The membership includes scientists and engineers from China, the Soviet Union and many developing nations.

The Society assists in the operation of many international scientific organizations. Among these are the International Commission for Optics, the International Quantum Electronics Council, the International Management Committee for the Conference on Integrated Optics and Optical Fiber Communication, and the International Steering Committee for the Optical Fiber Sensors Conference. The Society also sponsors a program of international lecturers to developing nations and has formal agreements with optical societies of other countries for exchange of visiting scholars.

The Society publishes five peer-reviewed scientific journals which report advances in optical science and engineering. Approximately three-quarters of the advances in optical science and engineering are published in the journals of the Society. Some 14,000 pages of technical literature will appear in these five journals in 1989. In addition to the individual subscriptions, libraries throughout the world purchase subscriptions to the journals. Nearly 25% of the nonmember subscribers to the journals reside outside of the United States.

The quality of American science is recognized throughout the world. This accomplishment is due not only to the ability of individuals, but to the considerable resources already devoted to building academic, governmental and commercial institutions which can generate, evaluate, modify, combine and refine previous advances. The interest of the *amicus* is in protecting a climate in which scientific information and developments can be comfortably examined and the current level of American participation in world science can be maintained. The Society has been able to sponsor its publications, conduct technical meetings and secure worldwide cooperation because American law protects a climate of scientific inquiry of immense appeal throughout the world.

The importance of the American scientific climate is accentuated by the growth of science as well as recent improvements in world diplomatic relationships. These improvements present the possibility of more harmonious scientific dialogue between previous adversaries. These developments are awaited with anticipation and hope by the scientific community.

Although the Society is well aware that certain types of information may require restricted circulation, the Society also recognizes, from long experience, that the superiority of American science and engineering depends upon the publication and receipt by American scientists and institutions of scientific information. The *amicus* has a substantial interest that this first amendment interest be properly protected.

The concern of the Society is that existing conflicts among the Circuits and resulting uncertainty in application of American criminal law through the enforcement of the

Export Administration Act are impairing the basis for scientific discussion. The Society is further concerned that misapplication and conclusive effect of administrative assertions given by the panel may impair the sixth amendment jury trial rights of scientists.

Although the Society takes no position on the merits of the underlying controversy, criminal prosecution of scientists in the midst of these conflicts will continue a chilling effect on the process and substance of scientific communications. This situation warrants clarification and explanation of applicable law by this Court. With this interpretation, responsible scientists and scientific institutions will be able to understand their responsibilities and continue a tradition of commitment to scientific exchange under the law.

Society of Photo-Optical Instrumentation Engineers

The Society of Photo-Optical Instrumentation Engineers ("SPIE") is a non-profit society dedicated to advancing engineering and scientific application of optical and optoelectronic instrumentation, systems and technology. SPIE was founded in 1955 and has a membership of almost 10,000 persons from all over the world, but mostly from the United States of America.

SPIE is dedicated to facilitating the communication of new developments and applications to the scientific, engineering, and user communities through publications and symposia. SPIE sponsors four major meetings each year in the four corners of the United States. Each such meeting has between 3,000 and 8,000 attendees. At these meetings, papers are presented concerning recent developments in

the field of optical engineering, state-of-the-art optical equipment is exhibited, and tutorials are presented for continuing education purposes. The proceedings of these meetings are published by SPIE, thereby completing the cycle of information exchange. Other, smaller, regional meetings are held on approximately a monthly basis. SPIE has recently expanded to Europe and it is beginning to explore the Pacific Rim.

SPIE is vitally concerned with protecting the freedom of scientists and engineers to communicate with each other about their work. Since the Commodity Control List ("CCL") maintained pursuant to the Export Administration Act includes "technology" as well as "goods," it has frequently been used to restrict communication concerning controlled commodities. It is extremely important to SPIE that the authority of the Secretary of Commerce to place readily available common nonstrategic items on the CCL is made subject to the reasonable limitations intended by Congress and the Constitution; otherwise, the ability of scientists and engineers to facilitate the advancement of technologies through symposia and other forms of professional communication among themselves will be seriously hindered.

In addition, the possibility that the Secretary may exercise authority to conclusively determine, after the fact, whether an item was covered by the CCL for criminal prosecution purposes has frightening implications for members of SPIE and the rest of the scientific community. Under such authority, prosecution could occur even if a certain technology was not expressly included on the CCL. The Secretary could initiate a criminal prosecution against a scientist who had discussed such technology at a symposium, on the grounds that such technology was

implicitly within the meaning of some other item on the CCL. The Secretary's retroactive interpretation of the scope of that other item would be absolutely conclusive, and the accused scientist would not even be allowed to offer evidence that the technology in question was not intended to be included on the CCL. Such absolute and unaccountable authority in the hands of the Secretary would deny SPIE's members due process of law with respect to an issue of fundamental importance -- whether or not the subjects of their technical papers were in fact included on the CCL. It would also have a significant and detrimental chilling effect upon the scientific community in general.

SPIE strongly believes that permitting the Secretary to impose what amounts to censorship upon exchanges of nonstrategic scientific information can only emasculate the progress of science and engineering. Scientists thrive on the interchange of ideas and problems, and science will surely wither if scientists are not allowed to talk to each other.

While SPIE takes no position with respect to the specific facts of the *Spawr* case itself, SPIE believes that the authority of the Secretary to create criminal liability pursuant to the Export Administration Act must be subject to certain reasonable limitations and the right to appeal in the usual forums of our nation. SPIE believes that the situation created by the existing conflicts among the Circuits has a present chilling effect upon scientific discourse, and therefore requires clarification and explanation of the application of the law by this Court.

STATEMENT OF THE CASE

The Secretary of Commerce, under the authority of the Export Administration Act ("EAA"), publishes a list of commodities for which an export license is required. This list is the Commodities Control List ("CCL").

Petitioners Spawr Optical Research, Inc. and Walter and Frances Spawr were convicted of exporting optical laser mirrors without a license as purportedly required by the CCL. The trial court permitted the prosecution's introduction of a document pertaining to restrictions on export of optical elements and appliances to certain limited countries which the government held out as the CCL. However, this document was not the CCL. Exculpatory material required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), withheld from the defense, suggested that the CCL did not require a license for export of the Spawr's mirrors. In ruling on the Spawr's motion for reconsideration under 28 U.S.C. § 2255, the trial court found that the Spawrs were not "materially prejudiced" because the issue of whether the Spawrs' optical mirrors were actually listed on the CCL was thought by the court not to be a triable issue of fact.

A sharply divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, holding that a defendant may not judicially challenge an Executive Branch determination of whether a product meets the description of an item listed on the CCL.

SUMMARY OF ARGUMENT

The decision in *Spawr* below has added to the confusion in the Circuits as to the proper burden of proof applicable to the EAA. By mandating conclusive effect of the government's position on a disputed issue of fact, the divided panel below may have denied the petitioners' constitutional right to a jury trial. The conflicting decisions in the Circuits have caused in uncertainty in the scientific community, which may result in substantially curtailed scientific debate and exchange of ideas. The *amici curiae* respectfully request the Court to grant the Spawrs' petition for a *writ of certiorari* in order to guard against the chilling effect the decision below casts on the release, exhange and receipt of scientific ideas protected by the first amendement.

ARGUMENT

I. THERE IS A CONFLICT IN THE CIRCUITS WHICH CREATES UNCERTAINTY WITHIN THE SCIENTIFIC COMMUNITY AS TO THE PROPER STANDARD FOR CRIMINAL PROSECUTION UNDER THE EAA

The decision below of the divided panel of the Court of Appeals for the Ninth Circuit adopted the prosecution argument that the government need not prove that a particular commodity or technology is in fact described by the CCL when exported or disseminated -- so long as the Secretary of Commerce asserts that it is on the list. In the court's view, a criminal defendant is forbidden to rebut even a plainly erroneous government assertion. "Right or

wrong, the trial court must accept this determination as a matter of law." *Spawr*, 864 F.2d at 1473.

The decision by the divided panel conflicts with the law in the Eighth Circuit. *United States* v. *Gregg*, 829 F.2d 1430 (8th Cir. 1987) cert. denied, __ U.S. __, 108 S.Ct. 1994 (1988) also reviewed the essential elements which must be proved by the government to make out a violation of the EAA. The Eight Circuit in *Gregg*, 829 F.2d at 1437, held:

> [T]he Government needs to prove . . . that the item exported appears on the . . . Commodity Control List . . . and . . . that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without an appropriate license.

More recently, a federal district court in California enunciated a different rule which appears to conform even more closely to the provisions of the EAA. In *United States* v. *Mandel*, 696 F. Supp. 505, 514 (E.D.Cal. 1988), the court held that:

> . . . defendants are entitled to some form of judicial review of the Secretary's determination that the items they are accused of exporting met the statutory criteria for inclusion on the CCL.

Mandel further ruled that the government must prove that the commodity at issue was not available outside the United States in order to substantiate that the commodity was properly listed on the CCL.

This confusing succession of interpretations warrants clarification of the standards applied to the prosecution under the EAA of scientists and manufacturers exchanging scientific information and apparatus. Clarification by the Court is important to the American and international scientific communities.

II. THE DECISION OF THE DIVIDED PANEL BELOW MAY HAVE DENIED PETITIONERS' SIXTH AMENDMENT RIGHT TO A JURY TRIAL BY GIVING CONCLUSIVE EFFECT TO THE GOVERNMENT'S POSITION ON DISPUTED ISSUES OF FACT IN A CRIMINAL TRIAL

The pertinent CCL was a listing of items which covered 76 single-spaced pages and incorporated by reference many additional supplemental listings. Despite the extensive and apparently exhaustive listing of items in the CCL, many CCL listings consisted only of criteria which described items requiring an export license. The divided panel of the Ninth Circuit found that it was unnecessary for the jury to decide whether Spawr's product actually met those criteria. The court held:

> The government need not establish independently at trial, as an element of the charged offenses beyond a reasonable doubt, that the Spawrs' mirrors were included on the CCL. . . *Spawr*, 864 F.2d at 1473.

In *Spawr* the resolution of whether the Spawrs' mirrors met the criteria outlined by the CCL most certainly is a factual determination. Relieving the government of its need to present a factual basis for an alleged violation of

the EAA offends the sixth amendment principle that the government must prove every issue of the fact to the jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). It is the jury which must determine each factual issue in a criminal trial. *Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979).

Judge Pregerson, dissenting from the Ninth Circuit panel's opinion, summarized the flawed position of the panel:

> [It is] the majority's position that in a criminal trial the fact finder is precluded from determining whether a commodity was in fact listed on the CCL at the time of the alleged criminal violation. *Spawr*, 864 F.2d at 1474.

After reviewing a previous decision involving the EAA and the constitutional infirmities raised by the majority's opinion, Judge Pregerson concluded:

> Whether the laser mirrors exported by the Spawrs were in fact on the CCL at the time they were exported is *an essential element of the offenses allegedly committed* by them. It was for the jury, *not* the Secretary of Commerce, to determine whether the Spawrs' laser mirrors were *in fact* an item listed on the CCL. (Emphasis supplied). *Id.*

In the situations where scientists may be subjected to criminal prosecution, the right to trial by jury should not be impaired. This Court should review the decision below.

III. CONCLUSIVE EFFECT OF DISPUTED ISSUES OF FACT IN CRIMINAL PROSECUTIONS CONCERNING EXCHANGE OF SCIENTIFIC INFORMATION MAY CHILL SCIENTIFIC DEBATE AND THE EXCHANGE OF SCIENTIFIC IDEAS PROTECTED BY THE FIRST AMENDMENT

American science depends upon the protection of the first amendment. The development of scientific theory and scientific research requires that scientists and engineers be able to present and receive ideas. The first amendment protects the interest of scientists both as conveyors and as recipients of scientific information.[2]

The regulations interpreting the EAA make clear the belief of the Commerce Department that the communication of scientific information discoveries and technical data are governed by the EAA and the CCL. 15 C.F.R. §379 (1988). Communication of scientific information which directly and significantly relates to industrial processes requires a license for export.[3]

By the terms of the regulations, a scientist who presents "technical data" (*i.e.*, scientific information or

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[2]*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 754, 756 (1976) (stating that "Freedom of speech presupposes a willing speaker. But when a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted))

[3] "Dissemination" of scientific information not "directly and significantly related to design, production, or utilization in industrial processes" is permissible without the requirement that a special license be sought for export. 15 C.F.R. § 397.3(b) (1988).

knowledge) at a conference in this country to attendees consisting of scientists from other countries has "exported" that information.[4]

Permitting the determination of guilt in a criminal prosecution to rest in the sole discretion of the Department of Commerce invites imposition of arbitrary and discriminatory application of the EAA upon scientific expression. Not only does this offend the sixth amendment, it encourages scientists to abort the presentation of scientific findings to the international scientific community. In order to preserve an "uninhibited marketplace of ideas", *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), explicit and narrowly-tailored standards of enforcement are required by the first amendment.

Customary first amendment overbreadth and vagueness issues arise from the imprecise drafting of a statute or regulation. The concern springs from the consequences of the overbroad or vague drafting, which may result in the arbitrary application of law.[5] In the present case, the arbitrary and final determination of

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[4]"Export of technical data means...any release of technical data within the United States with the knowledge or intent that the data will be shipped or transmitted from the United States." 15 C.F.R. §379.1(b)(ii)(1988).

[5]*Grayned* v. *City of Rockford*, 408 U.S. 106, 108-109 (1972) (reasoning that ". . .if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . .[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms' it operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas were clearly marked." (citations and footnotes omitted))

factual issues by the Department of Commerce as applied in a criminal prosecution threatens to chill the full participation of citizens in scientific and political discourse.

Recently, this Court considered the effect of a regulatory scheme to be applied in the sole discretion of a city official. *City of Lakewood* v. *Plain Dealer Publishing Co.*, __U.S.__, 108 S.Ct. 2138, 2147 (1988). This Court held:

> . . . a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. As demonstrated above, we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.

The reasoning of *City of Lakewood* applies with even greater force in this criminal case.

The uncertainties which surround criminal prosecution under the Export Administration Act ("EAA") have already chilled a strong first amendment interest of scientists in communicating and receiving scientific speech and ideas. The degree of confusion and its impact on the scientific process warrants review by this Court.

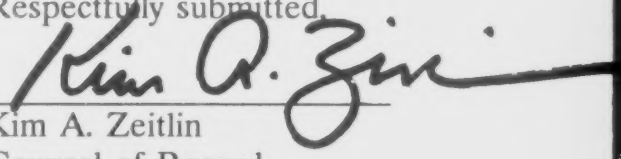
CONCLUSION

The effect of the conflict in the Circuits concerning criminal prosecutions under the EAA is to discourage scientists from attending meetings, publishing papers and initiating research subjects. The effect is to raise serious Sixth Amendment and First Amendment issues. Until this matter is resolved, scientists, technicians, and academicians who participate in a symposium or conference or who publish or disseminate scholarly papers and ideas run the risk that the Secretary of Commerce or his subordinate will initiate a prosecution -- and the accused scientist will not be permitted to rebut with fact the chief element of the criminal charge.

For the foregoing reasons, Amici Optical Society of America, Inc. and Society of Photo-Optical Instrumentation Engineers respectfully urges this Court to grant the petition for a *writ of certiorari*.

July 19, 1989

Respectfully submitted,



Kim A. Zeitlin
Counsel of Record
Susan E. Dorn
Lafayette Centre III
1155 Twenty-First Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 833-5775
Attorneys for Amici Curiae